Supreme Court, U.S.
FILED

99 342 AUG 23 1999

OFFICE OF THE CLERK

NO._____

In The

SUPREME COURT OF THE UNITED STATES

MIDWEST PRIDE IV

Petitioner,

vs.

STATE OF OHIO,

Respondent.

Petition For A Writ of Certiorari
To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

J. MICHAEL MURRAY (0019626)
(Counsel of Record)
BERKMAN, GORDON, MURRAY & DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245
Attorneys for Petitioner

Of Counsel:
BROOKE F. KOCAB
BERKMAN, GORDON, MURRAY & DEVAN

8787

QUESTIONS PRESENTED FOR REVIEW

The following question, on which the lower state and federal courts are sharply divided, is presented for review:

> Under What Circumstances Do the First, Sixth and Fourteenth Amendments Entitle an Accused in a Criminal Obscenity Case to Offer Evidence, Consisting of a Scientifically Valid Random Sample Survey on Community Standards, the Survey Results, and Expert Opinion Testimony from the Expert Who Conducted the Survey, in Support of the Defense That the Charged Materials Are Not Obscene Because They Do Not Violate the Relevant Contemporary Community Standards.

LIST OF PARTIES

The parties to the proceeding in the Ohio Supreme Court were Midwest Pride IV, Inc. as appellant and the State of Ohio as appellee.

There are no parent or subsidiary companies of Midwest Pride, IV, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE AND FACTS 3

EXPLANATION OF REASONS FOR ALLOWING THE WRIT 12

An Important Question Is Presented, on Which the Lower State and Federal Courts Are Sharply Divided, as to the Circumstances Under Which the First, Sixth and Fourteenth Amendments Entitle an Accused in a Criminal Obscenity Case to Offer Evidence, Consisting of a Scientifically Valid Random Sample Survey on Community Standards, the Survey Results, and Expert Opinion Testimony from the Expert Who Conducted the Survey, in Support of the Defense That the Charged Materials Are Not Obscene Because They Do Not Violate the Relevant Contemporary Community Standards. 12

TABLE OF CONTENTS (cont'd)

CONCLUSION 21

APPENDICES

Judgment Entry of the Court of Appeals
for the Twelfth Appellate District
(December 28, 1998). 1a

Opinion of the Court of Appeals for the
Twelfth Appellate District
(December 28, 1998). 2a

Entry of the Supreme Court of Ohio
(May 26, 1999). 33a

Judgment Entry of Conviction
(August 20, 1997). 34a

Constitution of the United States

First Amendment 37a

Sixth Amendment 37a

Fourteenth Amendment 37a

Ohio Revised Code

§2907.32 Ohio Rev. Code 39a

§2907.01 Ohio Rev. Code 41a

TABLE OF CONTENTS (cont'd)

Rule 702, Ohio Rules of Evidence 43a

Rule 703, Ohio Rules of Evidence 44a

Rule 704, Ohio Rules of Evidence 44a

Transcript of Defense Proffer 45a

Assignments of Error to the Court of Appeals of Ohio, the Twelfth Appellate District 57a

Propositions of Law to the Ohio Supreme Court 58a

TABLE OF AUTHORITIES

CASES

Asaff v. Texas, 799 S.W.2d 329
(Tex. App. 1991) 16

Carlock v. Texas, 609 S.W.3d 787
(Tex. App. 1980) 16

Chambers v. Mississippi, 410 U.S. 284,
93 S.Ct. 1038 (1973) 13, 14

Commonwealth v. Trainor, 374 Mass. 796,
374 N.E.2d 1216 (1978) 16, 18

County of Kenosha v. C & S. Mgmt, Inc.,
223 Wis.2d 373, 588 N.E.2d 236 (Wis. 1999) 18

Dunlap dba American Arcade v. State, 292 Ark. 51,
728 S.W.2d 155 (Ark. 1987) 16

Flynt v. State, 153 Ga.App. 232, 264 S.E.2d 669
(Ga. App.) *cert. denied*, 449 U.S. 888,
101 S.Ct. 245 (1980) 18

Hamling v. United States, 418 U.S. 87,
94 S.Ct. 28870 (1974) 13

Kaplan v. California, 413 U.S. 115,
93 S.Ct. 2680 (1973) 5, 14, 15

Miller v. California, 413 U.S. 15,
93 S.Ct. 2607 (1973) 4, 13-15

TABLE OF AUTHORITIES (cont'd)

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628 (1973) 13

People v. Nelson, 88 Ill. App.3d 196, 410 N.E.2d 476 (Ill. App., 2nd Dist. 1980) 16

People v. Page Books, 235 Ill. App.3d 765, 601 N.E.2d 273 (Ill. App., 2nd Dist. 1992) 16

Pizza v. Strope, 54 Ohio St.3d 41, 560 N.E.2d 765 (Ohio 1990) 15

Roth v. United States, 354 U.S. 476 (1957) 15

Saliba v. State, 475 N.E.2d 1181 (Ind. App., 2nd Dist. 1985) 15, 16

Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959) 5, 13-15, 20

State v. Anderson, 322 N.C. 22, 366 S.E.2d 459 (N.C. 1988) 18

State v. Williams, 75 Ohio App.3d 102, 598 N.E.2d 1250 (10th Dist. 1991) 10, 11

Toro v. City of Norfolk, 416 S.E.2d 29 (Va. App. 1992) 18

United States v. Pryba, 900 F.2d 748 (4th Cir. 1990) .. 18

TABLE OF AUTHORITIES (cont'd)

CONSTITUTIONAL PROVISIONS

United States Const., amend VI ..... i, 2, 10-12

United States Const., amend. I ..... i, 2, 10-13

United States Const., amend. XIV ..... i, 2, 5, 10-12

STATUTORY PROVISIONS AND EVIDENCE RULES

28 U.S.C. §1257 1

Ohio Rev. Code §2907.01 2

Ohio Rev. Code §2907.32 ..... 2, 3

Rule 702, Ohio Rules of Evidence 2

Rule 703, Ohio Rules of Evidence 2

Rule 704, Ohio Rules of Evidence 2

MISCELLANEOUS

Joseph T. Clark, Judge "The 'community standard' in the Trial of Obscenity cases - A mandate for empirical evidence in Search of the Truth," 20 Ohio N.U.L. Rev. (1993) 14

OPINION BELOW

The order of the Ohio Supreme Court dismissing the appeal for the reason that no substantial constitutional question exists is set forth in the Appendix at App. 33. The judgment entry and opinion of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District are set forth in the Appendix at App. 1, 2-32. The judgment entry denying petitioner's application for reconsideration is set forth in the Appendix at App. 36. The judgment entry of petitioner's conviction is set forth in the Appendix at App. 34.

JURISDICTION

The judgment entry of conviction of the Court of Common Pleas, Fayette County, Ohio was entered on August 20, 1997. App. 34. The opinion and judgment of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District were entered on December 28, 1998. App. 1, 2. The appellate court's judgment denying petitioner's application for reconsideration was entered February 1, 1999. App. 36. The judgment of the Ohio Supreme Court dismissing petitioner's appeal was entered on May 26, 1999. App. 33. This Court has jurisdiction to review the judgment rendered by the highest court of a state by writ of certiorari, pursuant to 28 U.S.C. §1257, where rights are claimed under the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, Ohio Rev. Code §§2907.32 and 2907.01, and Ohio Evidence Rules 702, 703 and 704 are reprinted in the Appendix to the Petition at App. 37-44.

STATEMENT OF THE CASE AND FACTS

On December 21, 1995, two Fayette County, Ohio sheriff's deputies entered the Lion's Den, a retail bookstore offering sexually expressive books and videotapes for sale, and purchased two sexually explicit videotapes. Thereafter, Midwest Pride, IV, Inc., the corporate owner of the bookstore, was indicted on two felony counts of pandering obscenity in violation of Ohio Revised Code §2907.32.[1]

In its case-in-chief, the prosecution presented no evidence of Fayette County's community standards, but rather, after publishing a small portion of one videotape and the entirety of the other videotape to the jury, asked the jury to rely upon its own knowledge in determining whether the charged materials violated Fayette County's community standards.

The defense case rested in part on the theory that the videotapes at issue were not obscene under the test set

---

1 O.R.C. §2907.32 provides in pertinent part:

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

* * *

(2) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;

forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973),[2] because they did not violate the community standards of Fayette County, Ohio. In that regard, the defense offered the expert testimony of Dr. Joseph Scott, a highly respected criminologist, sociologist and past college professor, who, at the defense request, had conducted a scientific random sample survey of Fayette County residents for the purpose of measuring the county's community standards for sexually explicit materials. The defense sought to admit into evidence the survey itself, with all of its questions and answers, Dr. Scott's testimony explaining the survey and its results, and his expert opinion that neither videotape, which he had twice viewed in their entirety, violated Fayette County's contemporary community standards. Tr. 303-15, App. at 45-55.

The prosecution did not challenge Dr. Scott's qualifications, the methods used to conduct the survey or the survey results. Rather, the prosecution objected to the admission of the defense evidence on the ground of

---

2 *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607 (1973). The test for obscenity is:

a. whether the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest;
b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
c. whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

relevance. In response to the objection, the defense, citing *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680 (1973), and Justice Frankfurter's concurring opinion in *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215 (1959), argued that the Due Process Clause of the Fourteenth Amendment "entitle[s] a defendant to put on evidence from expert witnesses as to what the contemporary community standards are," Tr. 293, and went on to argue that a valid and thorough foundation would be laid for the admission of the survey, Tr. 296, and further, that this evidence was important to the defendant's ability to present a defense. Tr. 298.

The trial court sustained the prosecution's objection, and in rejecting the defense evidence, concluded that "the results of public opinion polls are irrelevant" to an obscenity determination. Tr. 299.

The defense then proffered Dr. Scott's testimony, the survey and the survey's final summary report into evidence for the Record. Tr.303-15, App. at 45-55; Defendant's Exs. A, B and C.

In the proffer, Dr. Scott summarized his professional background and expertise, Defendant's Ex. A at 46-52, testified that the survey was conducted according to generally accepted standards in the scientific community, and that it was the type of survey generally relied upon by scientists measuring public opinions and attitudes. Tr. 314, App. at 55-56.

Dr. Scott further testified that in constructing the survey

to assure the scientific validity and accuracy of its results, he pre-tested the questions prior to their use with actual survey respondents. Question pre-testing was accomplished by calling Fayette County residents, asking the relevant questions, gaining feedback of the participant's understanding of the questions and seeking suggestions, if any, for clarification. Defendant's Ex. A at 58-59.

As part of the survey, and after questions related to demographics were asked, survey respondents were advised that the type of materials which were the subject of the survey portrayed:

> Primarily graphic depictions of nudity and sex, showing a variety of actual sexual activities, including: vaginal intercourse, ejaculation, bondage, oral sex, masturbation, anal sex, use of vibrators, lesbian sex, group sex and variations of these by adult performers. No minors are involved, and these materials can only be purchased, rented, or viewed by adults who desire them.

Defendant's Ex. C at 10. Dr. Scott further testified that this statement accurately described the activities portrayed in the videos at issue. Tr. 311, 314; App. at 52, 55. Specifically, he testified that:

> the survey describes the sexual conduct in these specific materials. In viewing the material I did not view any sexual conduct or portrayals of sex that were not addressed in the survey.

Defendant's Ex. A at 130.

After describing the materials, the survey asked four key questions designed to elicit Fayette County residents' level of acceptance of the described materials. Those questions and residents' responses were:

17. Do you think standards have changed in Fayette County so that the rental or sale, of video cassettes and magazines depicting such nudity and sex, to adults, is more acceptable or less acceptable today than in recent years?

More acceptable	43.5%
Equally acceptable	10.0%
Less acceptable	33.0%
Don't know/No answer (DK/NA)	13.5%

18. Do you agree or disagree that the portrayal of sexual conduct in X-rated videos and sexually explicit magazines, as described, is acceptable in Fayette County for those adults who may want to purchase and view them?

Agree	50.5%
Disagree	41.0%
DK/NA	8.5%

19. Is it acceptable or not acceptable in Fayette County, for such videos and

magazines to be sold or rented to adults who request such materials?

Acceptable	41.0%
Not Acceptable	43.0%
DK/NA	16.0%

20. Do you believe that you, as an adult, should be allowed to purchase and view videos and magazines depicting such sexual conduct if you should want to do so?

Yes	69.5%
No	29.0%
DK/NA	1.5%

The next two key questions addressed whether the average Fayette County person, applying contemporary community standards, would find such materials to appeal to the prurient interest.

21. Would your viewing of adult videos and magazines depicting actual sex acts in great detail and with close-ups of the sexual organs, as described, appeal to any shameful, morbid, or unhealthy interest in sex that you might have?

Yes	13.5%
No	70.5%
DK	12.0%
NA	4.0%

22. Would the viewing of adult videos and magazines depicting actual sex acts in great detail and with close-up of the sexual organs, as described, appeal to any shameful, morbid, or unhealthy interest in sex that the average adult in Fayette County might have?

Yes	25.0%
No	41.0%
DK	28.5%
NA	5.5%

Defendant's Ex. C at 19, 22, 26, 28, 31, 34.

After testifying about his background, experience, and expert qualifications, the method and manner of conducting the random sample survey, the results of the survey, and after verifying that the survey was done in accordance with accepted standards of the scientific community, Tr. 314; App. at 55-56. Scott opined that the materials at issue, which he had twice viewed in their entirety, Tr. 308, 312; App. at 50, 54, would not appeal to the prurient interest of the average adult person in Fayette County, Tr. 309-310, 313; App. at 51-53, 54, and that the sexual activity on the videotapes would not be deemed to depict sexual conduct in a patently offensive way. Tr. 311, 313; App. at 52, 54-55.

The trial court, as noted, rejected the defense evidence, stating "telephone or public opinion polls are [not] correct ways to determine what is obscene material . . . . [R]esults of public opinion polls are irrelevant." Tr. 299.

On appeal, petitioner argued that the trial court's exclusion of the proffered evidence and testimony constituted reversible error under the First, Sixth and Fourteenth Amendments to the United States Constitution by preventing it from presenting evidence critical to its defense. *See* App. at 57. In reviewing petitioner's assignment of error, the court of appeals recognized that "the defendant can introduce competent, relevant, and appropriate expert testimony," Op. at 11, App. at 12, (citation omitted), and indeed, found the trial court's rationale for excluding the proffered evidence was "clearly contrary to the weight of the authority that has held that 'a properly conducted opinion poll may be relevant to a determination of whether a particular film in question is obscene.'" Op. at 15, App. at 16. Nevertheless, relying on a two-part test articulated by the Ohio Tenth District Court of Appeals in *State v. Williams*, 75 Ohio App.3d 102, 598 N.E.2d 1250 (10th Dist. 1991)[3], it affirmed the trial court's ruling because, in its view, the survey did not "address the community's acceptance of the particular work in question." Op. at 13, App. at 14. (Emphasis original). In doing so, it said:

While we do find that some of the survey questions

---

3 Following *Williams*, the court of appeals held that "in order to determine whether public opinion poll evidence is relevant, a reviewing court must ask: (1) does the survey address community standards in general, and (2) does the survey address the community's acceptance of the particular work in question." Op. at 13, App. at 14. It went on to note that the trial court "has wide discretion in determining admissibility." Op. at 14, App. at 14-15 (citation omitted) (quoting *Williams*, 75 Ohio App.3d at 114).

> arguably address Fayette County community standards in general, upon review we find that no question in the public opinion poll addresses the second prong of the *Williams* test. That is to say, no question specifically references the videotapes in question. Not a single question in the survey describes the material alleged to be obscene or addresses any of the specific acts shown in the videotapes. We find that such questions are not only relevant, but crucial in order to ascertain the community's acceptance of the video and to avoid misleading an interviewee.

Op. at 16-17, App. at 17.

In reaching its conclusion, the appellate court disregarded Dr. Scott's expert testimony that the description given to survey respondents described the sexual conduct contained in these specific materials, Defendant's Ex. A at 130, that the survey was conducted in accordance with scientifically accepted standards, Tr. 314, App. at 55, that this telephone survey was as good as or better than a face-to-face survey in which the respondents actually viewed the material in question, Defendant's Ex. A at 130, and that the survey was a scientifically accurate method of measuring Fayette County's community standards with regard to these specific videotapes. Defendant's Ex. A at 130.

In its appeal to the Ohio Supreme Court, the petitioner again argued that the First, Sixth and Fourteenth Amendments required the trial court to permit the defendant to present a defense by admitting the scientific

random sample survey, its results and Dr. Scott's opinion testimony relative thereto, App. at 58, but the Ohio Supreme Court dismissed Petitioner's appeal. App. at 33. This case is now before this Court on Petition for Writ of Certiorari.

EXPLANATION OF REASONS FOR ALLOWING THE WRIT

An Important Question Is Presented, on Which the Lower State and Federal Courts Are Sharply Divided, as to the Circumstances Under Which the First, Sixth and Fourteenth Amendments Entitle an Accused in a Criminal Obscenity Case to Offer Evidence, Consisting of a Scientifically Valid Random Sample Survey on Community Standards, the Survey Results, and Expert Opinion Testimony from the Expert Who Conducted the Survey, in Support of the Defense That the Charged Materials Are Not Obscene Because They Do Not Violate the Relevant Contemporary Community Standards.

This Petition asks the Court to resolve the conflict among the lower courts with regard to whether and to what extent limitations may be imposed upon the constitutional right of an accused in a criminal obscenity prosecution to present scientifically sound expert evidence in his defense, consisting of a random sample survey conducted in accordance with scientifically acceptable methods, the survey results and opinion testimony from the expert who conducted the survey and viewed the material at issue, for the purpose of establishing that the charged materials are

not obscene because they do not violate the contemporary community standards.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The right[ ] . . . to call witnesses in one's own behalf [has] long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973). Indeed, "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 294, 935 S.Ct. at 1049. (Emphasis added).

In a criminal obscenity case, the jury must decide whether the materials at issue are obscene under this Court's decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), or are constitutionally protected speech under the First Amendment. The first two prongs of the *Miller* test are governed by the contemporary community standards of the community in which the charge is brought.

The prosecution in an obscenity case is not required to submit evidence of community standards as long as the materials themselves are placed into evidence. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 and n.6, 93 S.Ct. 2628, 2634 and n.6 (1973); *Hamling v. United States*, 418 U.S. 87, 104, 94 S.Ct. 2887, 2900 (1974). Rather, while not permitted to judge the material based upon their own personal views, the jurors are permitted to draw on their own knowledge of the community in determining whether a community standard exists and whether the charged materials violate it. *See Smith v. California*, 361 U.S. 147, 165, 80 S.Ct. 215,

225 (1959) (Frankfurter, J. concurring). However, and due in part to the difficulty in making that determination, this Court has recognized that the defense "should be free to introduce appropriate expert testimony" on the community standards element in defending a criminal obscenity charge in order to assist the jury in performing its duties. *Kaplan v. California*, 413 U.S. 115, 121, 93 S.Ct. 2680, 2685 (1973) (citing *Smith v. California*, 361 U.S. 147, 164-65, 80 S.Ct. 215, 224-25 (1959) (Frankfurther J. concurring)); *Miller v. California*, 413 U.S. 15, 31 n.12, 93 S.Ct. 2607, 2619 n.12 (1973). *See also* Joseph T. Clark, Judge "The 'community standard' in the Trial of Obscenity cases - A mandate for empirical evidence in Search of the Truth," 20 Ohio N.U.L. Rev. (1993).

Permitting a defendant to introduce expert evidence on the community standards element of the obscenity charge ensures the sanctity of the defendant's fundamental constitutional right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973). In that regard, in his concurring opinion in *Smith*, Justice Frankfurter pointed out that a defendant charged with a criminal obscenity offense has a right,

> a right implicit in the very nature of the legal concept of obscenity - to enlighten the judgment of the tribunal . . . regarding the prevailing literary and moral community standards and to do so through qualified experts . . . . [T]o exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional

> safeguards of due process. The determination of obscenity no doubt rests with the judge or jury. Of course, the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene . . . .

361 U.S. at 165, 80 S.Ct. at 225. (Frankfurter, J ., concurring) (Emphasis added) (citation omitted) (citing *Roth v. United States*, 354 U.S. 476, 489 (1957)). *See also Miller*, 413 U.S. at 31 n.12, 93 S.Ct. at 2619 n.12 (1973); *Kaplan v. California*, 413 U.S. at 121, 93 S.Ct. at 2685 (1973) ("defense should be free to introduce appropriate expert testimony"). (Emphasis added).

Although this Court has recognized that an accused in an obscenity prosecution has a right of constitutional dimension to put on a defense and to put on appropriate expert testimony in furtherance of that right, the Court has yet to delineate the contours of that right or provide any guidance to the lower courts as to when the exclusion of such evidence will rise to the level of constitutional error. As a result, a conflict has developed among the lower courts on this very issue.

For instance, in some jurisdictions, survey evidence, if established to be scientifically sound, has been held admissible, despite an objection to the adequacy of the survey, because such an objection goes to the weight to be accorded the evidence and not its admissibility. *See Pizza v. Strope*, 54 Ohio St.3d 41, 560 N.E.2d 765 (Ohio 1990); *Saliba v. State*, 475 N.E.2d 1181 (Ind. App.2d Dist. 1985);

Dunlap dba American Arcade v. State, 292 Ark. 51, 728 S.W.2d 155 (Ark. 1987); *People v. Page Books*, 235 Ill. App.3d 765, 601 N.E.2d 273 (Ill. App., 2nd Dist. 1992); *People v. Nelson*, 88 Ill. App.3d 196, 410 N.E.2d 476 (Ill. App., 2nd Dist. 1980); *Asaff v. Texas*, 799 S.W.2d 329 (Tex. App. 1991); *Carlock v. Texas*, 609 S.W.3d 787 (Tex. App. 1980).

The Indiana appellate court, in *Saliba v. State*, 475 N.E.2d 1181 (Ind. App. 2d Dist. 1985), gave a thorough explanation as to when and why survey evidence should be admitted, noting:

> Expert testimony based on a public opinion poll is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise: 'A properly conducted public opinion survey itself adequately ensures a good measure of trustworthiness, and its admission may be necessary in the sense that no other evidence would be as good as the survey evidence or perhaps even obtainable as a practical matter.'

475 N.E.2d at 1184-85. (citing *Commonwealth v. Trainor*, 374 Mass. 796, 374 N.E.2d 1216, 1221 (1978)).

Moreover, the Indiana appellate court held that despite the survey's failure to present survey respondents with the ultimate question to be decided (i.e., whether the particular film at issue was obscene), "the poll was relevant." And, quoting *Carlock v. State*, 609 S.W.2d 787 (Tex. Crim. App. 1980), it went on to say:

It is arguable that the survey would have been more probative if it had asked whether the particular magazine in question appealed to the prurient interest of the average person. Even so, this would not authorize the trial court to exclude from evidence the public opinion survey offered in this case. The expert evidence would not be rendered inadmissable simply because more probative questions could have been incorporated into the poll.

The failure to poll the population on the ultimate issue does not negate relevancy. The population's general opinion is probative, although not determinative of community standards and, consequently, of the population's specific opinion of the film in question.

The admissibility of a public opinion poll depends primarily upon the presence of circumstantial guarantees of trustworthiness. (citing 1 J. Moore, Moore's Fed. Practice §2.712 (1982) . . . . Circumstantial guarantees of trustworthiness are premised on 1) the use of generally accepted surveying techniques . . . and 2) adherence to statistically correct methods in conducting the poll and evaluating the results.

* * * *

Once these foundational requirements are established, subject to cross-examination, the

> poll is admissible . . . . Any objection, other than lack of foundational requisites, and any testimony challenging the foundational testimony affect the weight accorded the poll, not its admissibility. (citing J. Moore at 139).

Id. at 1187-88.

In other jurisdictions, survey evidence has been rejected for a variety of reasons. For instance, although recognizing a defendant's right to present expert evidence on community standards, courts have excluded surveys, *in toto*, where respondents have been given written descriptions of the sexual conduct contained in the charged materials instead of being asked to view the material at issue, *see United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990); *County of Kenosha v. C & S Mgmt, Inc.*, 223 Wis.2d 373, 588 N.E.2d 236 (Wis. 1999); *Toro v. City of Norfolk*, 416 S.E.2d 29 (Va. App. 1992), where the survey is found to have included inappropriate or irrelevant questions, *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459 (N.C. 1988), *Flynt v. State*, 153 Ga.App. 232, 264 S.E.2d 669 (Ga. App.) *cert. denied*, 449 U.S. 888, 101 S.Ct. 245 (1980), and/or where the survey failed to include questions deemed necessary. *Commonwealth v. Trainor*, 374 Mass. 796, 374 N.E.2d 1216 (Mass. 1978).

On appeal, the court of appeals in this case acknowledged that a defendant should be permitted to introduce appropriate survey evidence on community standards, and agreed that at least three of the questions in the survey at issue were "arguably relevant" to determining the contemporary community standards of Fayette County,

Ohio. However, after paying lip service to the right of the accused to put on such evidence, the court of appeals then rendered the right meaningless by holding that the trial court has "wide discretion" in ruling on the issue, and by setting up barriers to the admission of expert defense evidence that can never be met. Thus, the appellate court took the description of the materials contained in the survey, i.e.,

> Primarily graphic depictions of nudity and sex, showing a variety of actual sexual activities, including: vaginal intercourse, ejaculation, bondage, oral sex, masturbation, anal sex, use of vibrators, lesbian sex, group sex and variations of these by adult performers. . . .

and pronounced it inadequate to describe the particular materials at issue. On that ground, the appellate court affirmed the trial court's exclusion of the evidence as being well within the trial court's wide discretion. Yet, it is hard to imagine how the sexual depictions could have been more clearly described in the survey. Thus, it is fair to conclude that no description would have satisfied the court of appeals.

After being given the description of the kind of material that was the subject of the random sample survey, the respondents were asked key questions scientifically designed to shed light on how the community perceived such materials, and to ascertain the contemporary community standards of Fayette County, Ohio. The respondents answered those questions and their responses were completely set forth in the survey. If such evidence did

not shed light on the contemporary community standards of Fayette County, Ohio, then it is impossible to imagine the evidence that would. Indeed, the proffered survey was the best evidence that possibly could have been obtained on the contemporary community standards issue, particularly since the random sample survey was conducted by a sociologist particularly trained and experienced in this field.

If trial courts are free to exclude scientific evidence which goes to the essence of the defense, then the defendant's constitutional right to put on evidence in his defense and have a jury consider all relevant evidence in its deliberations, is rendered meaningless. In that regard, particularly appropriate are Justice Frankfurter's comments in his concurring opinion in *Smith v. California*, where he acknowledged that a defendant has a right,

> a right implicit in the very nature of the legal concept of obscenity - to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. . . . to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process.

361 U.S. at 164-65, 80 S.Ct. at 225.

The lower courts are divided on this issue and the admission of survey evidence arises in nearly every obscenity prosecution throughout the nation. This case presents a perfect opportunity for this Court to resolve the conflict among the lower courts, and to clarify the meaning of the constitutional right, recognized in numerous decisions of this Court, to put on a defense in any obscenity case.

CONCLUSION

For all of the foregoing reasons, the petitioner, Midwest Pride IV, Inc., respectfully requests this Court to accept this case for review.

J. MICHAEL MURRAY (0019626)
(Counsel of Record)
BERKMAN, GORDON, MURRAY & DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245
Attorneys for Petitioner

Of Counsel:
BROOKE F. KOCAB
BERKMAN, GORDON, MURRAY & DEVAN

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA97-09-025
-vs-	:	JUDGMENT ENTRY
MIDWEST PRIDE IV, INC.,	:	(Filed Dec. 28, 1998)
Defendant-Appellant.	:	

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

/s/ William W. Young
William W. Young, Presiding Judge

/s/ Richard N. Koehler
Richard N. Koehler, Judge

/s/ James E. Walsh,
James E. Walsh, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA97-09-025
-vs-	:	OPINION
MIDWEST PRIDE IV, INC.,	:	(Filed Dec. 28, 1998)
Defendant-Appellant.	:	

Steven H. Eckstein, Fayette County Prosecuting Attorney, 214 W. Market Street, Washington C.H., Ohio 43160-1316, for plaintiff-appellee

Berkman, Gordon, Murray & DeVan, J. Michael Murray, Brooke F. Kocab, Angela M. Greene, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113-1949, for defendant-appellant

Young, P.J. Defendant-appellant, Midwest Pride IV, Inc., d/b/a/ The Lion's Den Adult Bookstore, appeals its convictions in the Fayette County Court of Common Pleas on two separate counts of pandering obscenity. Appellant raises five assignments of error. For the reasons set forth herein, the trial court's decision is affirmed.

FACTUAL BACKGROUND

On December 21, 1995, Randy Bliss ("Bliss"), a Ross County Deputy Sheriff, entered the Lion's Den at the intersection of I-71 and SR 35 in Fayette County. Bliss selected one four-hour adult video entitled "Rammin' and Crammin'"

for purchase. The video cover of "Rammin' and Crammin'" contains several photographs of various adult couples engaged in numerous sex acts.

On December 22, 1995, Jeff McCarty ("McCarty"), an Adams County Deputy Sheriff entered The Lion's Den and selected a one half-hour adult video entitled "Guys Who Butt Ball Themselves" for purchase. The video consists of two vignettes involving men with eighteen-inch penises engaging in anal intercourse with themselves with the assistance of various nude women.

Appellant was indicted on two separate counts of pandering obscenity in violation of R. C. 2907.32(A) (5). Both indictments contained a specification that appellant had previously been convicted of pandering obscenity, and such prior convictions resulted in appellant's offenses being elevated to fourth degree rather than fifth degree felonies[1]. The trial for both cases commenced on August 13, 1997.

Jury selection spanned two full days. During jury selection, the trial court sua sponte dismissed a potential juror named Teresa Caulley ("Caulley"). Caulley had previously served on a pandering obscenity case in Fayette County that resulted in an acquittal of two of appellant's employees. Unfortunately, in the instant case, the trial court's audio tape recording system malfunctioned during the portion of voir dire addressing Caulley's dismissal. Consequently, no transcript of

---

[1] R.C. 2907.32(C) provides:

> Whoever violates this section is guilty of pandering obscenity, a felony of the fifth degree. If the offender previously has been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

the exchange between counsel, the trial judge and Caulley exists.

The trial proceeded and the prosecution presented testimony from Deputies Bliss and McCarty. Both videos purchased at the Lion's Den were played for the jury in full and placed into evidence. Appellant then attempted to introduce into evidence the results of a public opinion poll survey of Fayette County residents, and the expert testimony of Dr. Joseph Scott, a sociologist and criminologist with a background in statistical methodology who had conducted the survey. Dr. Scott's survey was specifically designed to ascertain community standards regarding sexually explicit materials.

The survey's first seventeen questions identified innocuous information, including the interviewee's age, gender, county of residence, voting status, political affiliation, religious practices, annual income, reading habits and movie viewing frequency. Following these introductory questions, interviewers were directed to read the following statement to interviewees:

> The next few questions deal with adult x-rated videos and sexually explicit magazines. These videos and magazines may have little or no plot. Their contents are primarily graphic depictions of nudity and sex, showing a variety of actual sexual activities including: vaginal intercourse, ejaculations, bondage, oral sex, masturbation, anal sex, use of vibrators, lesbian sex, group sex and variations of these by adult performers, no minors are involved, and these materials can only be purchased, rented, or viewed by adults

who desire them.

Each interviewee was then asked the following questions:

17. Do you think standards have changed in Fayette County so that the rental or sale, of video cassettes and magazines depicting such nudity and sex, to adults, is more or less acceptable today than in recent years? (Emphasis sic.)

18. Do you agree or disagree that the portrayal of sexual conduct in X-rated videos and sexually explicit magazines, as described, is acceptable in Fayette County for those adults who may want to purchase and view them? (Emphasis sic.)

19. Is it acceptable or not acceptable in Fayette County, for such videos and magazines to be sold or rented to adults who request such material? (Emphasis sic.)

20. Do you believe that you, as an adult, should be allowed to purchase and view videos and magazines depicting such sexual conduct if you should want to do so?

21. Would your viewing of adult videos and magazines depicting actual sex acts in great detail and with close-ups of the sexual organs, as described, appeal to any shameful, morbid, or unhealthy interest in sex that you might have?

> 22. Would the viewing of adult videos and magazines depicting actual sex acts in great detail and with close-ups of the sexual organs, as described, appeal to any shameful, morbid, or unhealthy interest in sex that the average adult in Fayette County might have?

At trial, the prosecution objected to the introduction of the public opinion poll survey, its results, and Dr. Scott's expert opinions. The prosecution contended that such evidence was neither relevant nor probative, and that the survey only touched on "nudity and sex" as broadly defined. The prosecutor further argued that since the videos "Rammin' and Crammin'" and "Guys Who Butt Ball Themselves" were in fact admitted into evidence, they were the best evidence available and the admission of the public opinion poll and its results were not necessary.

The trial court excluded appellant's expert testimony and the opinion poll results stating:

> Well, I'm familiar with this survey of the doctor has conducted (sic). It's a telephone survey and I've reviewed it and heard his testimony in a prior matter, and as I indicated before, I don't believe that telephone or public opinion polls are correct ways to determine what is obscene material. *** I agree *** that the results of public opinion polls are irrelevant.

For the record and outside the presence of the jurors, appellant proffered Dr. Scott's methodology and his expert opinion that the materials, as described by the survey, fell within the community standards of Fayette County residents.

At the conclusion of the case, the trial court issued several instructions to the jury. Appellant, quoting State v. Keaton (1996), 113 Ohio App.3d 696, requested that the jury be instructed about the state's burden of proof as follows:

> X. The state bears the burden of proving all three elements of obscenity to the satisfaction of the jury beyond a reasonable doubt. It is not required to introduce evidence of community standards *** [However], should the state fail to introduce evidence of community standards *** [you] as the trier of fact may choose to find that the state has failed to sustain its burden of proof.
>
> XI. Should the [state] fail to introduce evidence of community standards ***, [you, as] the trier of fact may choose to find that the state has failed to sustain its burden of proof.
>
> XII. [You as the] jury [are] free to acquit [the defendant if you are] unable to determine community standards.

The trial court refused to give the jury appellant's proposed instructions and opted instead to read the burden of proof instructions taken directly from Ohio Jury Instructions. Specifically, the jury was charged as follows:

> In order for the material to be obscene, all three elements of this test must be proven beyond a reasonable doubt: (1) Whether the average person, applying contemporary community standards would find that the work, taken as a

> whole, appeals to prurient interest. (2) Whether to the average person applying contemporary community standards, the work depicts or describes in a patently offensive way, sexual conduct as defined in these instructions. (3) Whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.

At the close of the jury charge the court reiterated:

> If you find that the state proved beyond a reasonable doubt all of the essential elements of any one or both of the offenses charged in the indictments, your verdict must be guilty as to such offense or offenses according to your findings. If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of one or both of the offenses charged in the indictments, your verdict must be not guilty, as to such offense or offenses according to your findings. (Emphasis added.)

Following deliberations, on August 20, 1997, the jury unanimously convicted appellant on both counts of pandering obscenity. The trial court then sentenced appellant to the maximum in fines totaling $20,000. Appellant filed its notice of appeal on September 17, 1997.

Upon discovering that no transcript of the trial court's sua sponte dismissal of Caulley as a potential juror existed, pursuant to App.R. 9, appellant filed two motions to supplement the record; one on February 27, 1998 with the trial

court, and one on March 9, 1998 with this court. Appellant's proposed supplement to the record consisted of a total of seven paragraphs, all of which were submitted to the prosecutor for approval. An affidavit filed with the trial court from appellant's counsel indicated that the prosecutor took issue with proposed paragraph number five, and consequently refused to sign the stipulation.

On March 19, 1998, the trial court filed its judgment entry. The entry consisted of seven paragraphs. The only discrepancies between appellant's proposed stipulated paragraphs and the trial court's entry appear in paragraphs five and six. Appellant's proposed supplemental paragraphs five and six read as follows:

> 5. Potential juror Teresa Caulley was called to the jury box for questioning. During questioning by counsel, Ms. Caulley indicated that she had been a juror in a prior pandering obscenity case involving two young women. She volunteered that she would prefer not to serve again as a juror in the same kind of case, but said that if required to serve she could be fair and impartial. At that time, the judge, without request from any counsel, sua sponte excused the juror.
>
> 6. Prior to the juror leaving the courtroom, defense counsel approached the bench and objected to the judge's sua sponte dismissal of the juror, and asked the court to reverse itself and re-seat her. Counsel pointed out that the jury trial referred to by potential juror Caulley was State v. Walp and Alcorn, pandering

> obscenity cases based on videotapes similar to those at issue in this trial which involved employees of Midwest Pride IV, Inc., the current defendant, who were acquitted by the jury. Counsel then argued based on the questions asked of Ms. Caulley and the answers she gave, that since there was no real reason to excuse Ms. Caulley under the rules, the real reason for the judges' (sic) decision to sua sponte dismiss her was because she was on a jury that acquitted the defendant's employees of pandering obscenity.

However, the supplemental paragraphs adopted by the trial court pursuant to App.R. 9(E) read as follows:

> 5. Potential juror Teresa Caulley was called to the jury box for questioning by counsel, Ms. Caulley indicated she had been a juror in a prior pandering obscenity case involving two young women. She volunteered that she would prefer not to serve again as a juror in the same kind of case. At that time, the trial court excused the juror.
>
> 6. After the juror had left the courtroom, and another juror had been seated for questioning, defense counsel approached the bench and objected to the judge's dismissal of the juror, and asked the court to reverse itself and re-seat her. Counsel contended that the jury trial referred to by potential juror Caulley was State v. Walp and State v. Alcorn, which involved employees of Midwest Pride IV, Inc., who were

> acquitted by the jury, and that the judge's dismissal of juror Caulley was because of this acquittal in the prior case.

THE ASSIGNMENTS OF ERROR

In its first assignment of error, appellant contends:

> THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE APPELLANT (SIC) TO PRESENT EXPERT TESTIMONY AND A RANDOM SAMPLE SURVEY AND ITS RESULTS INTO EVIDENCE WHERE THE EVIDENCE WAS RELEVANT TO THE CONTEMPORARY COMMUNITY STANDARDS ELEMENT OF THE MILLER TEST FOR OBSCENITY, AND AS A RESULT, THE APPELLANT (SIC) WAS PREVENTED FROM PRESENTING A DEFENSE IN VIOLATION OF THE FIRST, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Central to an understanding of appellant's assignment of error is a determination of whether or not the videos purchased at The Lion's Den are legally obscene. The constitutional test for obscenity was announced by the Supreme Court in Miller v. California (1973), 413 U.S. 15, 93 S.Ct. 2607. A video in the instant case may be deemed obscene, thereby losing its first amendment protection, if a factfinder concludes that:

> (1) the average person applying contemporary community standards, would find that the video, taken as a whole, appeals to the prurient interest;

> (2) the video depicts, in a patently offensive way, sexual conduct specifically defines; and
>
> (3) the work taken as a whole lacks serious literary, artistic, political, or scientific value.

Id. at 24.

We begin with the premise that if the materials themselves are placed into evidence, they "are the best evidence of what they represent ***." Paris Adult Theater I v. Slaton (1973), 413 U.S. 49, 56, 93 S.Ct. 2628, 2634. Accordingly, the Supreme Court has held that "there is no constitutional need for expert testimony once the challenged materials are placed into evidence." U.S. v. Pryba (E.D.Va. 1988), 678 F.Supp. 1225, 1231. In fact, in an obscenity case, expert testimony is not required in order to determine whether certain materials are obscene, unless the materials are "directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest ***." Urbana, ex rel. Newlin v. Downing (1989), 43 Ohio St.3d 109, 113; citing Paris Adult Theater I v. Slaton (1973), 413 U.S. 49, 56, fn. 6.

However, the foregoing case law does not mean that expert testimony concerning the Miller test is per se inadmissible. On the contrary, the United States Supreme Court has held that "the defendant can introduce competent, relevant, and appropriate expert testimony." Pryba at 1231, citing Kaplan v. California (1973), 413 U.S. 115, 121, 93 S.Ct. 2680. In fact, while affirming the exclusion of certain evidence in an obscenity case prior to the instant case, we stated that: "[t]he trial court rulings did not deprive appellants of their right to introduce other evidence, including expert and lay

testimony, concerning the obscenity test." State v. Keaton (1996), 113 Ohio App.3d 696, 702 (emphasis added). Such language suggests that in certain situations, this court would consider the admission of certain expert testimony concerning the Miller test both relevant and proper. The instant case, however, is not one of those situations.

A number of cases have addressed the relevance and admissibility of opinion poll evidence and expert opinions within the Miller obscenity test context, including the case upon which the trial court in the instant case relied, U.S. v. Pryba (E.D.Va. 1988), 678 F.Supp. 1225. In Pryba, the court was faced with the admission of public opinion poll evidence conducted by Dr. Scott which allegedly addressed the community standard prong of the Miller obscenity test. The court in Pyrba held that the results of the public opinion poll were irrelevant because the "pollster's questions were not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials." Id. at 1228 (emphasis added). Rather, the court reasoned, the survey focused on the general opinions, attitudes and acceptance of "the viewing of 'nudity and sex,' defined broadly." Id. at 1229. The court also noted that often,

> language, however rich for some purposes, is simply unequal to the task of conveying to a reader what the visual images convey to the viewer. There is, no doubt, a large difference in communicative impact and effect between the written phrase "homosexual fellatio and anal intercourse" and the vivid depiction of it on video.

Id. at 1227, fn. 3. The district court in Pyrba reasoned that "[e]ven if the poll's results were relevant, the probative value

of this evidence was substantially outweighed by the danger that it would have been unfairly prejudicial ***, would have confused the issues, and would have mislead the jury." Id. at 1231 (citations omitted).

Three years after Pyrba, the Tenth District Court of Appeals was faced with determining whether similar testimony from Dr. Scott and the results of a public opinion poll he conducted allegedly addressing the community standards in Franklin County, Ohio were admissible. Ind State v. Williams (1991), 75 Ohio App.3d 102, the Tenth District Court of Appeals articulated the following two-pronged test to determine whether public opinion poll evidence addressing the community standard prong of the Miller obscenity test was relevant:

> a properly conducted opinion poll may be relevant to a determination of whether the particular film in question is obscene. On the issue of relevance, the poll must be relevant to a determination of community standards in general and the community's acceptance of viewing the particular film in question.

Id. at 113 (emphasis added). Thus, pursuant to Williams, in order to determine whether public opinion poll evidence is relevant, a reviewing court must ask: (1) does the survey address community standards in general, and (2) does the survey address the community's acceptance of the particular work in question. While the Tenth District Court of Appeals remanded the matter to the trial court in order for it to make a determination of relevancy, the court was careful to state that whatever the outcome, "the trial court nevertheless has wide discretion in determining admissibility." Id. at 114, citing State v. Sage (1987), 31 Ohio St.3d 173.

Three weeks later, the Tenth District Court of Appeals again addressed the issue of the admissibility of public opinion poll evidence and related testimony. In State v. Caudill (1991), 75 Ohio App.3d 322, the appellant sought to have a public opinion poll conducted by Dr. Scott admitted into evidence. The court of appeals reiterated the fact that "the predominant view is that the admission of expert testimony regarding community standards is not required, but within the discretion of the trial court." Id. at 328 (citation omitted). Then, while affirming the trial court's exclusion of the opinion poll survey and related evidence, the court stated:

> The survey proffered here was a random telephone survey of approximately five hundred people and explored whether Franklin County residents were, in general, offended by sexually explicit materials. It did not specifically reference the video tape in question, nor did the survey describe the material alleged to be obscene or ask questions based upon the specific acts shown in the videotape.

Id. at 328 (emphasis added). Thus, the court found that the public opinion poll evidence did not meet the two pronged relevancy test set out in Williams, and affirmed the trial court's exclusion of such evidence.

In the instant case, we find that the trial court ultimately arrived at the right result when it denied admission of the public opinion poll results when it denied admission of the public opinion poll results and expert testimony. However, the trial court arrived at that result for the wrong reason. The trial court stated that it did not "believe that telephone or public opinion polls [were] correct ways to determine what is

obscene material." Such reasoning is clearly contrary to the weight of authority that has held that "a properly conducted opinion poll may be relevant to a determination of whether a particular film in question is obscene." Williams at 113. Nevertheless, we find that the trial court's exclusion of survey evidence and expert opinions should be affirmed on other grounds.

The survey's questions do not satisfy the two-pronged test of relevancy articulated by the court of appeals in Williams. Upon careful review of the public opinion poll's six community standard questions, we find that only three of the questions even arguably address Fayette County's contemporary community standards regarding sexually explicit materials.[2] The remaining three questions are not relevant to ascertaining Fayette County's contemporary community standards regarding sexually explicit materials. Question seventeen asks whether or not the interviewee thinks that standards in Fayette County have changed in recent years, but fails to address what the actual Fayette County standard is or was. Question twenty is designed to ascertain the particular interviewee's general belief as to whether or not adult video and/or magazines should enjoy constitutional protection. Such a question is immaterial in ascertaining Fayette County's contemporary community standards regarding sexually explicit materials. Finally, question twenty-one is designed to ascertain whether adult videos and/or magazines appeal to the particular interviewee's own personal prurient interest, rather than addressing whether such materials fall within Fayette County community standards.

---

[2] We find that questions eighteen, nineteen, and twenty-two arguably are designed to ascertain the contemporary community standards of the average Fayette County adult within the obscenity context.

While we do find that some of the survey questions arguably address Fayette County community standards in general, upon review we find that no question in the public opinion poll addresses the second prong of the Williams test. That is to say, no question specifically references the videotapes in question. Not a single question in the survey describes the material alleged to be obscene or addresses any of the specific acts shown in the videotapes. We find that such questions are not only relevant, but crucial in order to ascertain the community's acceptance of a video and to avoid misleading an interviewee. While the terms "masturbation" and "anal sex" were, in fact, read to each interviewee before the public opinion poll's community standards questions were asked, we note, for example, that had the interviewees been given a description of a visual image of a man with a grossly enlarged penis engaged in anal intercourse with himself, they may have given very different survey responses. Accordingly, because the public opinion poll conducted by Dr. Scott did not inquire into whether any of the explicit sexual acts depicted on the videos in question fell within the contemporary community standards of Fayette County, the evidence fails to satisfy the second prong of the Williams test. We find that the public opinion poll, its results, and Dr. Scott's expert opinions would have been, at best, of tenuous probative value.

The admission of survey evidence lies directly within the "wide discretion" of the trial court. State v. Sage (1987), 31 Ohio St.3d 173. Any probative value the survey evidence may have had in this case was substantially outweighed by the danger that it would have been unfairly prejudicial, would have confused the issues, and could have potentially mislead the jury. We therefore find that Dr. Scott's public opinion poll evidence was of marginal probative value and was in fact potentially prejudicial, misleading and confusing to the jurors.

It was therefore properly excluded, and appellant's first assignment of error is overruled.

In its second assignment of error, appellant contends:

> THE TRIAL COURT ERRED BY REFUSING TO GIVE PERTINENT, CORRECT JURY INSTRUCTIONS ON COMMUNITY STANDARDS AS REQUIRED BY THE DEFENSE IN WRITING ON A TIMELY BASIS.

Appellant's second assignment of error requires an analysis of this court's decision in State v. Keaton (1996), 113 Ohio App.3d 696. In Keaton, the appellant requested that the jurors be instructed that if they could not determine community standards with respect to the explicit sexual materials in question, they must acquit the appellant. Analyzing the instruction, this court held that an instruction compelling or mandating the jurors to acquit appellant under such circumstances was an incorrect statement of law. In the instant case, rather than request an instruction that if jurors were unable to determine contemporary community they were compelled or mandated to acquit appellant, appellant requested that the jurors be given an instruction that if jurors were unable to determine contemporary community standards they could acquit. Appellant further contends that because the requested instruction was both a pertinent and correct statement of law, the trial court erred in refusing to provide it to the jurors.

When reviewing a trial court's jury instructions, an appellate court must limit its review to whether the trial court's refusal to give a requested jury instruction constitutes an abuse of discretion under the facts and circumstances of the case. State v. Wolons (1989), 44 Ohio St.3d 64, 68; Prejean v. Euclid

Bd. of Education (1997), 119 Ohio App.3d 793, 804-805. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Blakemore v. Blakemore (1983) 5 Ohio St.3d 217, 219.

Ohio case law provides that a party's requested jury instructions "should ordinarily be given if they are correct statements of law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction." Prejean at 804, citing Murphy v. Carrollton Mfg. Co. (1991), 61 Ohio St.3d 585, 591. Additionally, while "it is not mandatory upon trial court to give requested instructions to the jury verbatim *** if the requested instructions contain a correct, pertinent statement of the law and are appropriate to the facts they must be included, at least in substance, in the court's charge to the jury." State v. Nelson (1973), 36 Ohio St.2d 79, paragraph one of the syllabus (emphasis added). Nevertheless, because a "[trial] court retains discretion to use its own language to communicate *** legal principles," Ohio courts have held that a "trial court need not give a proposed instruction in the precise language requested by its proponent, even if it properly states an applicable rule of law." Youssef v. Parr (1990), 69 Ohio App.3d 679, 690.

Upon review of the applicable law and the actual instructions given to the jurors in the instant case, we find that the trial court did not abuse its discretion by instructing the jury as it did. The trial court's instructions adequately advised the jury of the applicable burden of proof, namely, that the state had the burden of proving all three elements of the obscenity test beyond a reasonable doubt, and that if the jurors found that "the state failed to prove beyond a reasonable doubt any one of the essential elements," then a not guilty verdict was

warranted. Appellant's proposed instructions would have simply instructed the jury on these same legal principles using different language. In light of the instructions given, appellant's proposed instructions would have been repetitive and might have actually confused the jurors.

Accordingly, because the trial court's instructions were (1) correct and pertinent statements of the law, (2) appropriate to the facts of the instant case, and (3) communicated to the jurors, at least in substance, the same legal principles as appellant's requested instructions, we find that the trial court did not abuse its discretion by refusing to instruct the jury as requested by appellant. The second assignment of error is therefore overruled.

In its third assignment of error, appellant contends:

> THE TRIAL COURT ERRED IN FAILING TO PROVIDE THE APPELLANT (SIC) WITH A COMPLETE AND ACCURATE RECORD OF THE PROCEEDINGS.

Appellant argues that the supplemental record certified by the trial court mischaracterizes several factual events with respect to potential juror Caulley's dismissal. Specifically, appellant asserts that the fact that Caulley stated that she could be fair and impartial if she was required to serve was omitted form the trial court's entry. Furthermore, appellant objects to the trial court's determination of Caulley's physical location at the time appellant lodged its objection to her dismissal.

We find that the trial court was correct in determining that App.R. 9(E) governs the supplementation of the record under the circumstances of the instant case. App.R.9(E) provides in pertinent part:

> **Correction or modification of the record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, *** may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.

The instant case presented a situation in which neither of the parties, nor the trial court could agree upon how the events surrounding Caulley's dismissal transpired. After being presented with appellant's proposed stipulation, the prosecutor advised appellant's counsel that he could not sign it, and the trial court obviously disagreed with appellant.

When a conflict over the facts to be included in a supplement to the record arises, the Supreme Court has held that "[s]uch conflict is for the trial court to resolve in its sound discretion." State v. Schiebel (1990), 55 Ohio St.3d. 71, 82. "Where a trial court receives and evaluates conflicting evidence regarding the state of the record, the decision to correct or supplement the record pursuant to App.R. 9(E), rests upon the court's ability to weigh the evidence. Where it is supported by competent, reliable evidence, such a ruling will not be reversed by a reviewing court absent an abuse of discretion." Id.

In the case at bar, the trial court stated that it relied "upon its own recollection of the matter as refreshed by the filings of the parties and reference to the record" to construct a certified

record of the proceedings. App.R. 9 "gives the trial judge the responsibility, duty, and authority to delete, add, or otherwise modify portions of a proposed statement so that it will conform to the truth and be accurate before he approves it." Joiner v. Illuminating Co. (1978), 55 Ohio App.2d 187, 196.

> Naturally, in most instances when both parties who have competing and vested interests in the outcome of a case agree as to the accuracy of a statement of evidence or proceedings, it is unlikely that the trial judge would make any additions, deletions, or modifications and in all probability would approve it as submitted to him. However, Appellate Rule 9 does grant the trial court the responsibility and authority to make any such deletions, additions or modifications to a proposed narrative statement of evidence or proceedings.

Id. (emphasis added).

A comparison of appellant's proposed stipulation and the trial court's entry reveals that the trial court adopted, in large part, appellant's proposed paragraphs. The only differences between the two are factual in nature, and we find they are immaterial to the ultimate disposition of this case. The fact that the trial court omitted Caulley's alleged statement about her ability to remain fair and impartial, in light of her admitted prior jury service on a case involving (1) two employees of appellant, (2) the same criminal charge as is at issue in this case, and (3) similar explicit sexual materials, does not warrant a reversal of this matter. Additionally, we find that the dispute over Caulley's whereabouts at the time of appellant's objection is completely immaterial to this case's disposition.

Because the trial court found appellant's proposed stipulation unsatisfactory, it drafted its own statement of facts and evidence which has become the certified record of the proceedings. Well-established legal authority certainly grants the trial court this prerogative and discretion. Joiner at 196. Thus, pursuant to App.R. 9(E), we must presume that trial court's entry detailing the record of proceedings conforms to the truth. Accordingly, we hold that the entry filed by the trial court is the exclusive factual record of the proceedings before us for the purposes of appeal. See App.R. 12(A), and State v. Dickard (1983), 10 Ohio App.3d 293, 295. Appellant's third assignment of error is overruled.

In its fourth assignment of error, appellant contends:

> THE TRIAL COURT ERRED IN SUA SPONTE DISMISSING A QUALIFIED PROSPECTIVE JUROR IN VIOLATION OF THE APPELLANT'S (SIC) SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

The United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee the accused in a criminal case a fair and impartial jury. In this assignment of error, appellant contends that, in the absence of any indication that Caulley could not be fair and impartial, the trial court erred in sua sponte dismissing her. We disagree.

A potential juror may be dismissed from service by one of two methods. A juror may be removed from service when a party exercises a peremptory challenge, or a juror may be removed from service when a party challenges for cause.

Typically, a party requests that a member of the jury be dismissed from service as a juror because of a specific reason. In Ohio, such reasons are controlled by statute. See R.C. 2313.42 and R.C. 2945.25. However, in the instant case, the dismissal of juror Caulley was a result of the trial court's request, rather than the request of a party.

Neither appellant nor appellee has provided this court with any legal authority directly addressing this particular circumstance. Indeed, this court's own research has failed to uncover any precedent directly prohibiting a trial court from sua sponte challenging or dismissing jurors for cause. Consequently, we turn to the relevant provisions of the Revised Code and the Criminal Rules for guidance.

R.C. 2313.42 provides in relevant part:

> The following are good causes to challenge any person called as a juror:
>
> ***
>
> (J) That he discloses by his answers that he cannot be a fair and impartial juror ***.

R.C. 2945.25 in turn provides:

> A person called as a juror in a criminal case may be challenged for the following causes:
>
> ***
>
> (B) That he is possessed of a state of mind evincing

enmity or bias toward the defendant or the state; ***

(O) That he is otherwise unsuitable for any other cause to serve as a juror. (Emphasis added.)

Crim.R. 24, which closely mirrors R.C. 2945.25[3], further addresses the examination and challenging of jurors in a criminal case. Crim.R. 24 provides in relevant part:

(A) **Examination of juror.** Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court *** may itself conduct the examination. ***

(B) **Challenge for Cause.** A person called as a juror may be challenged for the following causes:

***

(9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state;

***

(14) That he is otherwise unsuitable for any other cause to serve as a juror. (Emphasis added.)

---

[3] Prior to the adoption of Ohio's Criminal Rules in 1974, the applicable provisions of the Revised Code controlled criminal procedure in this state. However, we note that now the Criminal Rules supersede their analogous Revised Code sections. State v. Oliver (Sept. 19, 1994), Preble App. No. CA94-03-003, unreported.

Accordingly, this court finds that implicit in Crim.R. 24 is a trial court's authority to sua sponte dismiss a juror when it determines that a juror is not impartial or otherwise unsuitable for service.

In addition to the foregoing authority bestowed upon the trial court, Ohio case law provides that "[a] trial court enjoys broad discretion in determining a juror's ability to be impartial." State v. Dennis (1997), 79 Ohio St.3d 421, 427, citing State v. Williams (1983), 6 Ohio St.3d. 281, 288. In fact, the Ohio Supreme Court has expressly stated "that the decision to disqualify a juror *** is a discretionary function of the trial court." Berk v. Matthews (1990), 53 Ohio St.3d. 161, 168 (emphasis added). "Where a trial court is vested with such authority, reversal on appeal is justified only if its exercise thereof constitutes an abuse of discretion." Id. at 169, citing Martin v. Martin (1985), 18 Ohio St.3d. 292, 294-295, and a trial court's ruling with respect to a potential juror "will not be disturbed on appeal unless it is manifestly arbitrary ***." State v. Tyler (1990), 50 Ohio St.3d 24, 31. Further, a trial court has the inherent power to do all things that are "necessary to the preservation of judicial powers and processes." State v. Lorain, (1968), 13 Ohio St. 2d 133, 137, citing State v. Townley (1902), 67 Ohio St. 21, 26-27.

When reviewing a trial court's decision to retain or dismiss a juror, "an appellate court is not free to substitute its judgment for that of the trial judge." Berk at 169. This court has previously stated that such deference is proper because it is only the trial court which "has the opportunity to observe the demeanor of the prospective juror and evaluate firsthand the sincerity of the juror's responses to questions ***." State v. Goff (Apr. 21, 1997), Clinton App. No. CA95-09-026, citing Berk at 169. A trial court's decision regarding a potential juror's

suitability for service shall be "based upon determinations of demeanor and credibility that are peculiarly within a trial court's province." Wainwright v. Witt (1985), 469 U.S. 412, 426, 105 S.Ct. 844, 854. Thus, pursuant to the applicable provisions of the Revised Code, Crim. R. 24, and the foregoing case law, we hold that a trial court may, in the exercise of its discretion, sua sponte dismiss a juror when it determines that a juror possesses either enmity or bias toward a party or determines that for some other reason a juror is not impartial or is otherwise unsuitable for service.

Turning our attention to the entry filed by the trial court which we have determined to be the exclusive factual record of Caulley's dismissal, we find that the trial court did not err when it sua sponte dismissed her from service. Juror Caulley admitted during questioning by counsel that she had served as a juror in a prior case (1) involving the exact same charge that is at issue in the instant case -- pandering obscenity; (2) involving two employees of the exact same defendant involved in the instant case -- Midwest Pride IV, Inc.; and (3) involving explicit sexual material similar in nature to those at issue in the instant case. It is reasonable to assume that in her prior jury service, Caulley amassed specific knowledge or information about appellant and its business and business practices that other potential jurors had not. Upon review of these facts, we find that the trial court could have reasonably determined that allowing Caulley to serve as a juror would have given rise to, at the very minimum, an appearance of bias or partiality.

Even if this court were to accept appellant's contention that Caulley expressly stated that she could remain fair and impartial if selected for jury service, our research reveals that the trial court would be free, in the exercise of its discretion, to determine that Caulley would be unable to faithfully and

impartially serve as a juror, and to dismiss her from service in spite of her comments to the contrary. Because an appellate court does not enjoy the luxury of being able to see and evaluate firsthand the demeanor and sincerity of a juror's responses, we respectfully defer to the trial court's determination of this issue. "A person called a juror in a criminal case who clearly shows himself, on his voir dire not to be impartial between the parties, is not rendered competent by saying that he believes himself able to render an impartial verdict ***." Palmer v. State (1885), 42 Ohio St. 596, paragraph three of the syllabus. Accordingly, we find that the trial court's sua sponte dismissal of Caulley was neither unreasonable nor manifestly arbitrary. Appellant's fourth assignment of error is overruled.

In its fifth assignment of error, appellant contends:

> THE TRIAL COURT ERRED IN NOT DISMISSING THE INDICTMENT OR AT THE LEAST IN FAILING TO STRIKE THE PRIOR CONVICTION ALLEGATION FROM THE INDICTMENT BECAUSE OF ITS FAILURE TO COMPLY WITH O.R.C. (SIC) 2941.11, AND BECAUSE THE PRIOR CONVICTION WAS ON APPEAL AND THEREFORE WAS NOT FINAL AT THE TIME THE CHARGED OFFENSES OCCURRED.

Appellant's attack on the indictment is twofold. First, appellant contends that because the indictment failed to conform to R.C. 2941.11 it was fatally defective. R.C. 2941.11 mandates that when an indictment alleges a prior conviction it should:

> allege that the accused was, at a certain stated time, in a certain stated court, convicted of a certain stated

> offense, giving the name of the offense, or stating the substantial elements thereof.

Appellant first contends that because the instant indictment simply provided, "the Defendant having been previously convicted of pandering obscenity," and fails to specify the exact nature of the prior offense, the date of the prior convictions and the court in which appellant was convicted, the trial court should have dismissed the indictment or struck the prior conviction language. Second, appellant contends that because at the time the instant indictment was filed, the prior convictions were pending on appeal and had not yet been affirmed they were not "final" and should not have been used to elevate the offenses in the instant case to fourth degree felonies. Upon review, we find both appellant's contentions to be without merit.

Crim.R. 7(B) provides in pertinent part:

> The indictment shall *** be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be *** in words sufficient to give the defendant notice of all of the elements of the offense with which the defendant is charged.

This court has previously addressed appellant's first contention under this assignment of error. Following the lead of other appellate courts, we have stated that Crim.R. 7(B) effectively supersedes R.C. 2941.11. State v. Oliver (Sept. 19, 1994), Preble App. No. CA94-03-003, unreported, at 2. "In order to comply with the requirements of Crim.R. 7(B), an indictment charging the defendant with [an elevated charge] need only give fair and adequate notice that the state will seek to prove that the

accused has previously been convicted ***." Id. at 2, citing State v. Larsen (1993), 89 Ohio App.3d. 371, 379. Thus,

> [w]here an indictment complies with Crim.R. 7(B) and gives the accused adequate notice that the state will seek to prove the accused previously had been convicted of prior *** offenses, the indictment does not need to allege that the accused was, at a certain stated time, in a certain stated court, convicted of a certain stated offense.

Id. at 2, citing Larsen at 379.

Accordingly, we find that the trial court did not err when it refused to dismiss the indictment or strike the prior conviction language from the indictment because it did not comply with the strict mandate of R.C. 2941.11. It is sufficient that the instant indictment complied with the requirements of Crim.R. 7(B).

We now turn to appellant's contention that because the prior convictions referenced in the instant indictment were on appeal and had not yet been affirmed, they were not "final" and therefore should not have been used to elevate the instant offenses into fourth degree felonies. In support of its contention, appellant cites State v. Staniforth (1927), 24 Ohio App. 208. In Staniforth, the Cuyahoga Court of Appeals held that if a prior offense is appealed and its final determination results in a "vitiating of the proceedings and the sentence," then the accused may not be convicted of a second elevated offense. Id. at 209. More recently, the Eighth District Court of Appeals held that where an accused's prior conviction for a criminal offense was found to be defective on appeal, no basis for his subsequent convictions on penalty enhanced offenses

existed. See State v. Gibson (1986), 34 Ohio App.3d. 146, 147. We note however, that in Gibson, rather than reverse the entire case, the court of appeals simply affirmed the accused's subsequent convictions without the enhanced penalty specifications. We further note that neither Staniforth nor Gibson are more than persuasive authority for this court.

We begin our analysis by examining what proof of "prior conviction" the prosecution is required to put forth at the time an indictment is filed. R.C. 2945.75(B) specifically directs our attention to the manner in which a prior conviction may be proved. See, also, State v. Henderson (1979), 58 Ohio St.2d 171, 177. R.C. 2945.75(B) provides that:

> Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

Our research reveals that nothing more is required. Furthermore, a judgment of conviction exists at the moment that sentence is imposed by the trial court. State v. Carter (1992), 64 Ohio St.3d 218, 222.

Accordingly, in the instant case, we find that at the time the indictment was filed, the trial court was not required to either dismiss the indictment or to strike the prior conviction language. However, even if this court were to assume that the trial court committed error in refusing to dismiss the indictment or to strike the prior conviction language, upon review of the facts of this case, we find such error to be harmless beyond a reasonable doubt. Crim.R. 52(A).

The prior convictions used by the prosecution in the instant case to elevate these offenses to fourth degree felonies were appellant's prior convictions in State v. Keaton. These prior convictions were immediately appealed to this court, where they were affirmed in August of 1996.[4] The trial court in the instant case did not enter its final judgment entry of conviction and sentence appellant until August 20, 1997, almost one full year after the Keaton appeals had been resolved. Thus, unlike the accused in Gibson, where the accused's prior conviction for a criminal offense was found to be defective on appeal, appellant's prior convictions were upheld on appeal. In a case such as this, where an appellate court affirms a prior conviction used to elevate a subsequent offense, an appellant suffers no prejudice.

Because we find that (1) appellant's indictment complied with the requirements of Crim.R. 7(B), and (2) that the inclusion of appellant's prior convictions which were on appeal worked no prejudice to appellant, appellant's fifth assignment of error is overruled. The judgment of the Fayette County Court of Common Pleas is affirmed.

KOEHLER and WALSH, JJ., concur.

---

[4] See conviction in State v. Keaton, (Aug. 31, 1995), Fayette CP Nos. 930131CR and 930132CR, which were subsequently upheld by this court in State v. Keaton (1996), 113 Ohio App.3d 696.

THE SUPREME COURT OF OHIO

1999 TERM

State of Ohio,	:	
Appellee,	:	Case No. 99-319
v.	:	ENTRY
Midwest Pride IV, Inc.,	:	(Filed May 26, 1999)
Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Berkman, Gordon, Murray & DeVan.

(Fayette County Court of Appeals; No. CA9709025)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

STATE OF OHIO,

Plaintiff, :: CASE NO. 950201 CR
950202 CR

vs.

MIDWEST PRIDE IV, INC.,

Defendant. ::

JUDGMENT ENTRY OF CONVICTION
(Filed Aug. 20, 1997)

On December 22, 1995, the defendant was indicted by the Fayette County Grand Jury and charged, in case numbers 950201 and 950202, with two counts of Pandering Obscenity, in violation of Revised Code section 2907.32, each offense a felony of the fourth degree. Counsel for the defendant appeared before the court on February 26, 1996, acknowledged service of the indictments and entered a plea of not guilty in each of the cases.

On August 13, 1997, trial by jury was held in this matter and the defendant was represented by attorneys J. Michael Murray and Brooke Kocab. Fayette County Prosecutor Steven H. Eckstein appeared on behalf of the State of Ohio. After deliberation, the jury found the defendant guilty of two counts of Pandering Obscenity, in violation of Revised Code section 2907.32, as charged in the indictments, each offense a felony of the fourth degree.

After the verdict was returned, there being nothing presented as to why sentence and judgment should not be imposed, sentence and judgment was pronounced as follows: for each of the two counts of Pandering Obscenity, each

offense a felony of the fourth degree, the defendant is ordered to pay a fine of ten thousand dollars ($10,000.00).

Costs of prosecution are taxed against the defendant and Judgement is hereby rendered against the defendant for such costs and the fine herein imposed.

/s/ Victor D. Pontious, Jr.
Victor D. Pontious, Jr., Judge

Copies of this entry were sent or delivered this filing date to:

Attorney for Plaintiff: Steven H. Eckstein
Attorney for Defendant: J. Michael Murray

/s/ Lynn Grunkemeyer
Assignment Clerk

IN THE COURT OF APPEALS OF FAYETTE COUNTY, OHIO

STATE OF OHIO,	:	
Appellee,	:	CASE NO. CA97-09-025
vs.	:	ENTRY
MIDWEST PRIDE IV, INC.	:	(Filed Feb. 1, 1999)
Appellant.	:	

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellant, Midwest Pride IV, Inc., on January 7, 1999.

The test generally applied when reviewing an application for reconsideration is whether the application calls the attention of the court to an obvious error in its decision or raises an issue for consideration which was either not considered at all or not fully considered when it should have been. State v. Black (1991), 78 Ohio App.3d 130.

Appellant's application for reconsideration presents further argument on issues that were presented to this court for decision during the course of this appeal. Appellant does not raise any issues that were not considered or not fully considered by this court in the opinion filed on December 28, 1998. Accordingly, the application for reconsideration is DENIED.

IT IS SO ORDERED.

/s/ William W. Young
William W. Young, Presiding Judge
/s/ Richard N. Koehler
Richard N. Koehler, Judge
/s/ James E. Walsh,
James E. Walsh, Judge

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

* * * *

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

OHIO REVISED CODE

2907.32 Pandering obscenity

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Buy procure, possess, or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

2907.01 Definitions

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regarding of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to the group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as

mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

OHIO RULES OF EVIDENCE

Evid R 702. TESTIMONY BY EXPERTS

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Evid R 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.

Evid R 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

TRANSCRIPT OF DEFENSE PROFFER
Pages 303-315

Page 303*

Mr. Murray: At this time, uhm, the defense is going to proffer the evidence that uh it wanted to put on but which the uh the uh Court has uh indicated would not be permitted at this trial. Uh, initially, uhm the witness whose testimony the defense uh was going to put on is uh Dr. Joseph Scott. Dr. Scott, are you currently sitting at the witness chair?

Dr. Scott: Yes, I am.

Mr. Murray: O.K. And would you please state your full name for the record?

Dr. Scott: Joseph E. Scott.

Mr. Murray: And uh what is your occupation, sir?

Dr. Scott: I'm a retired professor from Ohio State University. I am presently practicing law in Columbus, Ohio.

Mr. Murray: Now, sir, you've uh gave certain testimony in this Court did you not on February 11th, 1997 in a case entitled State of Ohio exrel Stephen H. Eckstein,

Page 304

Prosecuting Attorney, Fayette County, Ohio vs.

---

* Bold page numbers are trial transcript pages.

Midwest Pride Four, Inc. case number 950378CVH, did you not?

Dr. Scott: Yes.

Mr. Murray: And that testimony had to do with uh among other things, a survey that you conducted?

Dr. Scott: Yes, it did.

Mr. Murray: And uh that testimony that you gave on that occasion was truth?

Dr. Scott: Yes.

Mr. Murray: At this time, uh, Mr. Eckstein, to perhaps to speed up this process what I would like to do is mark as Defendant's Exhibit A a copy of the transcript from the case that I just referenced, pages forty-five through one hundred and thirty-five of the transcript and I would ask you to stipulate that those pages cover the testimony on direct and cross examination that was given by Dr. Joseph Scott at that proceeding on that date. And that I would further ask you to stipulate that that exhibit which would be marked Defendant's Exhibit A, a copy

Page 305

of the transcript pages forty-five through one thirty-five, with the exception of the identity of the particular video tapes in question, uh, being different titles in this proceeding than in that proceeding. But with that exception, uh the

testimony that Dr. Scott gave in that proceeding uhm accurately depicts the testimony that I would elicit from Dr. Scott today in this proceeding were I permitted by the Court to call him as a witness and had the Court not sustained your objection.

Mr. Eckstein: I'm not sure of your page numbers there, uh Mr. Murray. I need to go . . . .

Mr. Murray: Forty-five . . .

Mr. Eckstein: Through one thirty-five . . .

Mr. Murray: Through one thirty-five of that transcript.

Mr. Eckstein: We would stipulate that that is uh an accurate transcript of the testimony of Dr. Scott on the hearing on February 11th, 1997 and further that uh the entire, I could put the whole transcript in or just that uh . .

Page 306

Mr. Murray: No, just that testimony of Dr. Scott.

Mr. Eckstein: O.K. I need to double check and make sure that that was actually the end of the testimony. (Pause) I'll stipulate to that uh at least that the testimony is that uh Dr. Scott's.

Mr. Murray: Well, will you stipulate that in lieu of me asking him those same questions . . .

Mr. Eckstein: Oh, yeah.

Mr. Murray: . . . today. Will you stipulate that uh that if I were permitted to do so today in front of the jury, he would give that same testimony?

Mr. Eckstein: Yes.

Mr. Murray: Thank you. I will now hand this uh to our (inaudible). Uh, we have agreed that a copy of pages forty-five through one thirty-five of the transcript (inaudible) identify for the record is a copy and marked Defendant's Exhibit A and made a part of the record of this proceeding. Is that something you can accomplish for us? Thank you. In addition, um, Dr. Scott, I'm handing you what's been marked as Defendant's Exhibit B. Can you

Page 307

confirm that that is a true and accurate copy of a curriculum v-tape [*sic*] [vitae] concerning yourself?

Dr. Scott: Yes, it is.

Mr. Murray: And are the contents of Defendant's Exhibit B true and accurate?

Dr. Scott: To the best of my knowledge they are, yes.

Mr. Murray: And do they uh list the current credentials that you have in terms of your being a sociologist and a criminologist?

Dr. Scott: Yes, they do.

Mr. Murray: I would then proffer into evidence Defendant's Exhibit B. Handing you then what's been marked as Defendant's Exhibit C, can you identify that evidence?

Dr. Scott: Yes, this is a uh uh report of the Survey of Community Standards concerning sexually explicit material here in Fayette County, Ohio that was completed on April 1st, 1996.

Mr. Murray: And is that the uh, and, and what was the object of that survey again?

Dr. Scott: Uh, to determine what the uh community

Page 308

standards of adult residence in Fayette County was with regard to sexually explicit material.

Mr. Murray: And is that the survey about which you testified on February the 11th, 1997?

Dr. Scott: Yes, it is.

Mr. Murray: I would then proffer into evidence for the record the Defendant's Exhibit C. Now, Dr. Scott, did you at my request view a video tape entitled uh Super Shot's Ramin and Cramin?

Dr. Scott: Yes, I did.

Mr. Murray: Uh, its, the box is marked State's Exhibit 1, the box top that I'm referring to. Uhm, and did you view that video tape in it's entirety?

Dr. Scott: It's entire four hours, yes, I did.

Mr. Murray: On how many occasions.

Dr. Scott: Twice.

Mr. Murray: O.K. And do you believe that uh as a consequence of the random sample telephone survey that you did, you have sufficient data to formulate an opinion as to the contemporary community standards of Fayette County when it comes

Page 309

to sexually explicit material?

Dr. Scott: Yes, I do.

Mr. Murray: Doctor, let me ask you this question. Do you have an opinion to a reasonable degree of scientific certainty as to whether the video tape, Ramin and Cramin, as with respect to that video tape I should say, as to whether the average person applying contemporary community standards of Fayette County, Ohio would find that that video tape taken as a whole appeals to

Page 310

the prurient interest?

Dr. Scott: Let, let me just correct, I believe it's the tape

Super Shots Ramin and Cramin and a number I believe it was seventy-five. . .

Mr. Murray: Seventy-three.

Dr. Scott: Seventy-three.

Mr. Murray: O.K. Yes, uhm, do you have an opinion to a reasonable degree of scientific certainty as to whether or not that particular video, as to whether the average person applying contemporary community standards of Fayette County, Ohio would find that that particular video tape taken as a whole appeals to the prurient interest?

Dr. Scott: Yes, I do.

Mr. Murray: And what is your opinion?

Dr. Scott: That they would not.

Mr. Murray: And what is the uh basis for your opinion?

Dr. Scott: The basis of the opinion is the uh random digit dial telephone survey that was conducted with the uh random sample of adult residents of Fayette County and their responses to the specific key questions concerning sexually explicit material.

Mr. Murray: And what is it about those responses that uh causes you to form your opinion?

Dr. Scott: Uh, ana, analyzing the response in aggregate as well as the detailed analysis. There are differences in Fayette County and it's not that liberal a county as far as attitudes towards sex. That it seemed to be uh a community that was accepting this sexually explicit material, the majority of the people uh looking at all the different categories even of responses, the majority uh were

Page 311

accepting of sexually explicit material did not feel it would violate community standards.

Mr. Murray: And do you uhm have any opinion as to whether or not the uh description of the sexual, sexually explicit video tapes uh that you gave in your survey before asking the key questions adequately includes and describes the sexual conduct displayed in the particular video tape?

Dr. Scott: Yes, it does.

Mr. Murray: Do you have an opinion based, excuse me, do you have an opinion to a reasonable degree of scientific certainty whether the sexual conduct whether the average person applying contemporary community standards of Fayette County, Ohio the sexual conduct un in that particular video tape is depicted in a patently offensive way?

Dr. Scott: I do have an opinion and that opinion is that it is not depicted in a patently offensive way

according to the average resident of Fayette County.

Mr. Murray: And what is the uh basis for that

Page 312

opinion?

Dr. Scott: The basis, once again, is the survey that was conducted of two hundred randomly selected adult residents of Fayette County.

Mr. Murray: And what is it that that survey shows that causes you to formulate that opinion?

Dr. Scott: Once again, in asking a variety of questions worded in different ways that the average person in Fayette County would not have found that type of sexual presentation or conduct patently offensive or in violation of community standards . . .

Mr. Murray: O.K.

Dr. Scott: . . . of Fayette County.

Mr. Murray: Now, Dr. Scott, did you at my request view a video tape which is for our purposes marked as State's Exhibit 5, uhm entitled Guys Who Buttball Themselves?

Dr. Scott: Yes, I did.

Mr. Murray: On how many occasions did you view that

video tape?

Dr. Scott: Two.

Page 313

Mr. Murray: And do you have an opinion to a reasonable degree of scientific certainty as to whether the average person applying contemporary community standards of Fayette County, Ohio would find that that particular video tape, taken as a whole, appeals to the prurient interest?

Dr. Scott: I do have such an opinion.

Mr. Murray: And what is your opinion?

Dr. Scott: That is would not.

Mr. Murray: And what is the basis for that opinion?

Dr. Scott: Once again the survey conducted of the adult residents of Fayette County concerning sexually explicit material.

Mr. Murray: And do you have an opinion uh to a reasonable degree of scientific certainty as to on the question of um whether to the average person applying contemporary community standards of Fayette County, Ohio the sexual conduct in that video tape is depicted in a patently offensive way?

Dr. Scott: I do have such an opinion.

Mr. Murray: And what is your opinion?

Dr. Scott: That it would not.

Page 314

Mr. Murray: And what is the basis for that opinion?

Dr. Scott: The basis for that opinion once again is the survey and the variety of questions and definitions of sexual conduct as presented uh before the key questions were asked in the survey of adult residents of Fayette County.

Mr. Murray: And in your view, is the description of the sexually explicit video tapes, uh, that preceded the key questions in your survey adequate to include the sexual conduct depicted in that particular video tape?

Dr. Scott: Yes, it is.

Mr. Murray: And was your survey done in accordance with accepted standards of the scientific community, namely sociologists in conducting such surveys?

Dr. Scott: Yes.

Mr. Murray: And is our survey the type relied upon by scientists in attempting to ascertain attitudes of people?

Dr. Scott: Yes, it is.

Mr. Murray: And that uh concludes the proffer of the testimony and other evidence that uh I

Page 315

would have presented to the jury had the Court uh not precluded the defense from putting on the testimony of Dr. Scott and the um and the accompanying uh exhibits, Defendant's Exhibits A, B and C.

FIRST ASSIGNMENT OF ERROR
IN THE COURT OF APPEALS

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE APPELLANT TO PRESENT EXPERT TESTIMONY AND A SCIENTIFIC RANDOM SAMPLE SURVEY AND ITS RESULTS INTO EVIDENCE WHERE THE EVIDENCE WAS RELEVANT TO THE CONTEMPORARY COMMUNITY STANDARDS ELEMENT OF THE *MILLER* TEST FOR OBSCENITY, AND AS A RESULT, THE APPELLANT WAS PREVENTED FROM PRESENTING A DEFENSE, IN VIOLATION OF THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TR. 309-313; DEFENDANTS' EX. A, B, C.

Issue Presented for Review

Whether, in an obscenity prosecution, the First, Sixth and Fourteenth Amendments require a trial court to admit evidence of contemporary community standards by way of testimony from a qualified expert who conducted a scientific random sample survey, where a proper foundation for the evidence has been laid and where the evidence is relevant to the community standard elements of the *Miller* test for obscenity.

PROPOSITION OF LAW NO. 1
IN THE OHIO SUPREME COURT

IN AN OBSCENITY PROSECUTION, THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS REQUIRE A TRIAL COURT TO PERMIT A DEFENDANT TO PRESENT A DEFENSE BY ADMITTING EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS CONSISTING OF TESTIMONY FROM A QUALIFIED EXPERT WHO HAS CONDUCTED A SCIENTIFIC RANDOM SAMPLE SURVEY, THE SURVEY ITSELF, AND ITS RESULTS, WHERE A PROPER FOUNDATION FOR THE EVIDENCE HAS BEEN LAID AND WHERE THE EVIDENCE IS RELEVANT TO THE COMMUNITY STANDARD ELEMENT OF THE *MILLER* TEST FOR OBSCENITY.